

1 Muriel B. Kaplan, Esq. (SBN 124607)
Michele R. Stafford, Esq. (SBN 172509)
2 SALTZMAN & JOHNSON LAW CORPORATION
44 Montgomery Street, Suite 2110
3 San Francisco, CA 94104
(415) 882-7900
4 (415) 882-9287 – Facsimile
mkaplan@sjlawcorp.com
5 mstafford@sjlawcorp.com

6 Attorneys for Plaintiffs

7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 GIL CROSTHWAITE and RUSS BURNS, in
11 their respective capacities as Trustees of the
OPERATING ENGINEERS' HEALTH AND
12 WELFARE TRUST FUND, et al.,

13 Plaintiffs,

14 v.

15 FOSTER & SONS GENERAL
ENGINEERING CONTRACTORS, INC., a
16 California corporation,

17 Defendant.

Case No.: C10-0457 MMC

**AMENDED JUDGMENT
(PURSUANT TO STIPULATION)**

18
19 IT IS HEREBY STIPULATED by and between the parties, Plaintiffs OPERATING
20 ENGINEERS' HEALTH AND WELFARE TRUST FUND, et al. (collectively "Plaintiffs" or
21 "Trust Funds") and Defendant FOSTER & SONS GENERAL ENGINEERING CONTRACTORS,
22 INC., a California corporation, and its successor entities ("Defendant"), that the Judgment entered
23 on August 30, 2010 be amended as follows:

24 1. On August 30, 2010, Judgment was entered in favor of Plaintiffs and against
25 Defendant in the amount of **\$536,912.92**. A true and accurate copy of the Judgment is attached
26 hereto as **EXHIBIT A**. Defendant has further become indebted to the Trust Funds as follows:

27 ///

28 ///

Judgment			\$536,912.92
June 2010	Contribution Balance	\$23,609.48	
	Liquidated Damages	\$2,228.77	
	Interest	\$274.02	
			\$26,112.27
July 2010	Contributions	\$40,942.11	
	Liquidated Damages	\$3,380.90	
	Interest	\$138.55	
			\$44,461.56
August 2010	Contributions	\$2,469.39	
	Liquidated Damages	N/A	
	Interest	N/A	
			\$2,469.39
		SUB-TOTAL:	\$609,956.14
	Attorneys' Fees (7/7/10 – 9/19/10)		\$10,309.50
	Costs (5/25/10 – 9/7/10)		\$245.00
	9/1/10 Payment		(\$15,567.40)
		TOTAL:	\$604,943.24

2. Defendant shall *conditionally* pay the amount of **\$485,672.18**, representing the total amount due less conditionally waived liquidated damages in the sum of \$119,271.06. *This waiver is expressly conditioned on Trustee approval upon timely compliance with all of the terms of this Stipulation*, as follows:

(i) Beginning on October 15, 2010, and on or before the 15th day of each month thereafter, for a period of six (6) months, through March 15, 2011, Defendant shall pay to Plaintiffs the amount of **\$5,000.00** per month;

(ii) Beginning on April 15, 2011, and on or before the 15th day of each month thereafter, for a period of six (6) months, through September 15, 2011, Defendant shall pay to Plaintiffs the amount of **\$7,500.00** per month;

(iii) Beginning on October 15, 2011, and on or before the 15th day of each month thereafter, for a period of twelve (12) months, through September 15, 2012, Defendant shall pay to Plaintiffs the amount of **\$10,000.00** per month;

(iv) Beginning on October 15, 2012, and on or before the 15th day of each month thereafter, for a period of twenty-four (24) months, through September 15, 2014, Defendant shall pay to Plaintiffs the amount of **\$15,000.00** per month;

1 (v) Payments may be made by joint check, to be endorsed prior to submission.
 2 Defendant shall have the right to increase the monthly payments at any time and there is no
 3 penalty for prepayment;

4 (vi) Payments shall be applied first to unpaid interest and then to unpaid
 5 principal. The unpaid principal balance shall bear interest from September 20, 2010, at the rate of
 6 10% per annum in accordance with the Collective Bargaining Agreement and Plaintiffs' Trust
 7 Agreements;

8 (vii) Prior to Defendant's final payment, Plaintiff shall notify Defendant in
 9 writing as to the status of the waiver conditioned on timely payments pursuant to ¶ 2 above, timely
 10 payment of contributions pursuant to ¶ 4 below, as well as additional attorneys' fees and costs
 11 incurred as provided in ¶ 9. The waiver request shall not be considered unless and until all
 12 payments have been made pursuant to this Stipulation and Defendant's account is current.
 13 Plaintiffs shall further notify Defendant in writing as to the final amount due. Any additional
 14 amounts due pursuant to the provisions hereunder shall be paid in full with the final stipulated
 15 payment on September 15, 2014; and

16 (v) Checks shall be made payable to the *Operating Engineers Trust Funds*, and
 17 delivered on or before each due date to Michele R. Stafford at Saltzman & Johnson Law
 18 Corporation, 44 Montgomery Street, Suite 2110, San Francisco, California 94104, or to such other
 19 address as may be specified by Plaintiffs.

20 3. In the event that any check is not timely submitted or fails to clear the bank, or is
 21 unable to be negotiated for any reason for which Defendant is responsible, Defendant shall be
 22 considered to be in default of the Amended Judgment entered. If this occurs, Plaintiffs shall make
 23 a written demand to Defendant to cure said default within seven (7) days of the date of the notice
 24 from Plaintiffs. If caused by a failed check, default will only be cured by the issuance of a
 25 replacement *cashier's check*, delivered to Saltzman and Johnson Law Corporation within the
 26 seven (7) day cure period. If Defendant elects to cure said default, and Plaintiffs elect to accept
 27 future payments, *all such future payments shall be made by cashier's check*. In the event default
 28

1 is not cured, all amounts remaining due hereunder shall be due and payable on demand by
2 Plaintiffs.

3 4. Beginning with contributions due for hours worked by Defendant's employees
4 during the month of September 2010, due on October 15, 2010 and delinquent if not **received** by
5 the Trust Funds before October 25, 2010, and for every month thereafter until this Amended
6 Judgment is satisfied, Defendant **shall remain current in contributions** due to Plaintiffs under
7 the current Collective Bargaining Agreement and under all subsequent Collective Bargaining
8 Agreements, if any, and the Declarations of Trust as amended. **Defendant shall fax a copy of its**
9 **contribution report for each month, together with a copy of that payment check, to Michele**
10 **R. Stafford at 415-882-9287, prior to sending the payment to the Trust Fund office, along**
11 **with its stipulated payment, on or before the 30th day of each month.** To the extent that
12 Defendant is working on a Public Works job, or any other job for which **Certified Payroll**
13 **Reports** are required, copies of said Reports must be faxed to Michele R. Stafford, concurrently
14 with their submission to the general contractor, owner or other reporting agency.

15 Failure to comply with these terms shall also constitute a default of the obligations under
16 this Agreement and the provisions of ¶ 9 shall apply.

17 5. Failure to comply with any of the above terms shall constitute a default of the
18 obligations under this Agreement and the provisions of ¶ 9 shall apply. Any such unpaid or late
19 paid contributions, together with 20% liquidated damages and 10% per annum interest accrued on
20 the contributions, pursuant to the Trust Agreements, shall be added to and become a part of this
21 Judgment and subject to the terms herein. Plaintiffs reserve all rights available under the
22 applicable Bargaining Agreement and Declarations of Trust of the Trust Funds for collection of
23 current and future contributions, and for any additional past contributions not included herein as
24 may be determined by Plaintiffs, pursuant to employee timecards or paystubs, by audit, or other
25 means, and the provisions of this agreement are in addition thereto. Defendant specifically waives
26 the defense of the doctrine *res judicata* as to any such additional amounts determined as due.

27 6. Defendant shall make full disclosure of all jobs on which it is working by providing
28 Plaintiffs with an ongoing and updated list of jobs including, but not limited to, the name and

1 address of the job, the start and completion dates, the identity of General
 2 Contractor/Owner/Developer, and by providing certified payroll if it is a public works job. To the
 3 extent that Defendant is working on a Public Works job, or any other job for which Certified
 4 Payroll Reports are required, copies of said Reports will be faxed to Michele R. Stafford
 5 concurrently with their submission to the General Contractor, Owner or other reporting agency.

6 These requirements are concurrent with, and in addition to the requirements set forth above
 7 with regard to progress payments. Defendant shall fax said updated list each month (or sooner if
 8 required elsewhere herein) together with the contribution report (as required by ¶¶ 4 and 6 of this
 9 Stipulation) to Michele R. Stafford at 415-882-9287. Attached hereto as **EXHIBIT B** is a Job
 10 Report form, which is to be completed each month.

11 7. James Burrage Foster (“Cricket Foster”) acknowledges that he is the
 12 CEO/President of Defendant Foster and Sons General Engineering Contractors, Inc. (hereinafter
 13 “Guarantor”), and that he is personally guaranteeing all amounts to be paid in connection with the
 14 Stipulation, and acknowledges that all successors in interest to Foster & Sons General Engineering
 15 Contractors, Inc., as well as any assigns, and/or affiliated entities and purchasers, shall be
 16 contractually bound by the terms of this Stipulation. This shall include any additional entities in
 17 which Cricket Foster is an officer, owner or possesses any ownership interest. All such entities
 18 shall specifically consent to the terms herein and to the Court’s jurisdiction, in writing at the time
 19 of any assignment, affiliation or purchase.

20 8. Prior to the last payment pursuant to this Amended Judgment Pursuant to
 21 Stipulation, Plaintiffs shall advise Defendant, in writing, as to the final lump sum amount due,
 22 including interest and all additional attorneys’ fees and costs incurred by Plaintiffs in connection
 23 with collection and allocation of the amounts owed to Plaintiffs under this Stipulation regardless
 24 of whether or not Defendant defaults herein. Any additional amounts due pursuant to the
 25 provisions hereunder shall also be paid in full with the August 30, 2014 stipulated payment.

26 9. In the event that Defendant/Guarantor fails to make any payment required under ¶ 2
 27 above, or fails to remain current in any contributions under ¶ 4 above or fails to timely provide the
 28 monthly documents required by ¶¶ 4 and 6 herein, then:

(a) The entire amount of **\$604,943.24**, plus interest, reduced by principal payments received by Plaintiffs, but increased by any unpaid contributions then due, plus 20% liquidated damages and 10% per annum interest on those unpaid contributions until paid, shall be immediately due, together with any additional attorneys' fees and costs incurred during the term of this Stipulation;

(b) A Writ of Execution may be obtained against Defendant/Guarantor without further notice, in the amount of the unpaid balance, plus any additional amounts under the terms herein, upon declaration by a duly authorized representative of the Plaintiffs setting forth any payment theretofore made by or on behalf of Defendant/Guarantor and the balance due and owing as of the date of default;

(c) Defendant/Guarantor waives any notice of any Request for a Writ of Execution upon default, and expressly waives all rights to stay of execution and appeal. The declaration or affidavit of a duly authorized representative of Plaintiffs as to the balance due and owing as of the date of default shall be sufficient to secure the issuance of a Writ of Execution, without notice to Defendant/Guarantor; and

(d) Defendant/Guarantor shall pay all additional attorneys' fees and costs incurred by Plaintiffs in connection with collection and allocation of the amounts owed by Defendant/Guarantor to Plaintiffs under this Stipulation, whether or not a default occurs herein.

10. Any failure on the part of the Plaintiffs to take any action against Defendant/Guarantor as provided herein in the event of any breach of the provisions of this Stipulation shall not be deemed a waiver of any subsequent breach by the Defendant/Guarantor of any provisions herein.

11. In the event of the filing of a bankruptcy petition by the Defendant/Guarantor, the parties agree that any payments made pursuant to the terms of this Judgment, shall be deemed to have been made in the ordinary course of business as provided under 11 U.S.C. Section 547(c)(2) and shall not be claimed by Defendant/Guarantor as a preference under 11 U.S.C. Section 547 or otherwise. Defendant/Guarantor nevertheless represent that no bankruptcy filing is anticipated.

12. Should any provision of this Stipulation be declared or determined by any court of

competent jurisdiction to be illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term, or provision shall be deemed not to be part of this Stipulation.

13. This Stipulation is limited to the agreement between the parties with respect to the delinquent contributions and related sums enumerated herein, owed by Defendant/Guarantor to the Plaintiffs. This Stipulation does not in any manner relate to withdrawal liability claims, if any. Defendant/Guarantor acknowledges that Plaintiffs expressly reserve their right to pursue withdrawal liability claims, if any, against Defendant/Guarantor as provided by the Plaintiffs' Plan Documents, Trust Agreements incorporated into their Collective Bargaining Agreement, and the law.

14. This Stipulation contains all of the terms agreed by the parties and no other agreements have been made. Any changes to this Stipulation shall be effective only if made in writing and signed by all parties hereto.

15. This Stipulation may be executed in any number of counterparts and by facsimile, each of which shall be deemed an original and all of which shall constitute the same instrument.

16. Defendant/Guarantor represents and warrants that they have had the opportunity to be or has been represented by counsel of its own choosing in connection with entering this Stipulation under the terms and conditions set forth herein, that it has read this Agreement with care and is fully aware of and represent that it enters into this Stipulation voluntarily and without duress.

///

///

///

///

///

///

///

17. The parties agree that the Court shall retain jurisdiction of this matter until this Judgment is satisfied.

Dated: September 21, 2010

**FOSTER AND SONS GENERAL
ENGINEERING CONTRACTORS, INC.**

By: _____/s/

James Burrage Foster *aka* "Cricket Foster",
CEO/President

Dated: September 21, 2010

**JAMES BURRAGE FOSTER *aka*
"Cricket Foster"**

_____/s/

Individually, as Personal Guarantor

Dated: September 21, 2010

**OPERATING ENGINEERS
TRUST FUNDS**

_____/s/

David Hayner
Collections Manager

Dated: September 21, 2010

**SALTZMAN AND JOHNSON
LAW CORPORATION**

By: _____/s/

Michele R. Stafford
Attorneys for Plaintiffs
Operating Engineers Trust Funds

IT IS SO ORDERED

Dated: September 27, 2010


UNITED STATES DISTRICT COURT JUDGE

EXHIBIT A

AMENDED JUDGMENT (PURSUANT TO STIPULATION)

Operating Engineers' Health and Welfare Trust Fund v. Foster & Sons

General Engineering Contractors, Inc.

USDC, Case No.: C10-0457 MMC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GIL CROSTHWAITE, et al.,

Plaintiffs,

No. CV-10-0457 MMC

v.

FOSTER & SONS GENERAL ENGINEERING
CONTRACTORS, INC.,

JUDGMENT IN A CIVIL CASE

Defendant.

() Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED

1. Plaintiffs are entitled to delinquent contributions, liquidated damages, and pre-judgment interest in the amount of \$530,557.84.

2. Plaintiffs are entitled to reasonable attorney's fees in the amount of \$5,775.50.

3. Plaintiffs are entitled to costs in the amount of \$579.58.

Accordingly, plaintiffs' motion for default judgment is hereby GRANTED and plaintiffs shall have judgment against Foster & Sons in the amount of \$530,557.84 together with attorney's fees and costs in the amounts of \$5,775.50 and \$579.58, respectively, for a total of \$536,912.92.

Dated: August 30, 2010

Richard W. Wieking, Clerk

Tracy Lucero

By: Tracy Lucero
Deputy Clerk

EXHIBIT B

AMENDED JUDGMENT (PURSUANT TO STIPULATION)

Operating Engineers' Health and Welfare Trust Fund v. Foster & Sons

General Engineering Contractors, Inc.

USDC, Case No.: C10-0457 MMC

EXHIBIT B**AMENDED JUDGMENT (PURSUANT TO STIPULATION)*****JOB REPORT FORM***

***** Updated report must be faxed to Michele R. Stafford, Esq., at (415) 882-9287
on the 30th day of each month *****

Employer Name: **FOSTER & SONS GENERAL ENGINEERING CONTRACTORS, INC.**

Report for the month of _____ Submitted by (print name): _____

Project Name:			
Project Address:			
General Contractor:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

Project Name:			
Project Address:			
General Contractor:			
Contract #:		Date of Contract:	
Total Value of Contract:			
Work Start Date:		Work Completion Date:	

***** Attach additional sheets as necessary *****